It is to the mere intimation of a doubt by a plurality of the Barons in *Rex* v. *Humphrey*, that we owe the vague impression of a possible difference between the lien of warehousemen and wharfingers. Ordinarily the wharfinger's charges accrue for the mere passing over his wharves of freight, in the loading and unloading of cargo; he expends no labor or skill upon the goods, and has but the slightest tenure of possession; whereas, in the storing of goods, the warehouseman has a continuous and well-defined possession, and bestows labor and skill upon them. However, we take it, upon principle and authority, there is no substantial difference.

While the cases in Espinasse's Reports were determined at *nisi prius*, yet the eminence of the jurists who presided, of the counsel employed, with the universal acquiescence signified by the lapse of three-quarters of a century without their being disturbed, together with the confirmation they received in the Exchequer of Pleas from *Rex* v. *Humphrey*, have impressed upon them the stamp of very respectable authority.

ROBT. G. STREET.

GALVESTON, Texas.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

JOHN STANTON AND WIFE v. HAVERHILL BRIDGE CO.

The question of the competency of a foreign corporation to be sued is admitted by a general appearance from term to term and filing no dilatory plea.

A bridge corporation, which demands and receives tolls of travellers, is bound to keep its bridge and approaches in safe condition for use, and cannot excuse itself by impeaching its own title to maintain the same.

THIS was an action on the case by a toll-paying traveller to recover damages for a personal injury to the wife, accruing from the insufficient condition of defendant's bridge across Connecticut river. The other facts appear in the opinion, which was delivered by

REDFIELD, J.—I. However defective was the service of this process, we think the appearance of the defendant, by counsel, at the first term, and suffering a general continuance for that and the succeeding term of the court, is a waiver of all dilatory pleas, and

of all objection to the service of the writ: *Huntley* v. *Henry et al.*, 37 Vt. 165; *State* v. *Richmond*, 6 Foster 232. "A voluntary and general appearance in an action not only gives jurisdiction of the parties, but cures any irregularity in the service of the process:" *Carpenter* v. *Minturn*, 65 Barb. The defendant's plea does not allege or claim that the writ was not properly served, but that the defendant, being a foreign corporation, existing and doing business under the laws of New Hampshire, and having no franchise or property in this state, the courts in this state could not take or have jurisdiction of the persons or the subject-matter of this suit. The replication avers that the defendant is the owner of land in this state, on which the western abutment of the said bridge stands, and that the injuries complained of accrued by reason of the insufficiency in that part of said bridge. The general appearance, and continuance of the case, without objection to the service, was a waiver of all questions as to the regularity of the service, and a voluntary submission to the jurisdiction of the court over the *person* of the defendant. And the facts averred in the plea or replication could neither give nor take away such jurisdiction. It has often been held that the courts of this state may take jurisdiction of a foreign corporation when properly impleaded, and that a general appearance by an attorney gives such jurisdiction: *Hall* v. *Vt. & Mass. R. R. Co.*, 28 Vt. 409. The case of *March* v. *Eastern R. R. Co.*, 40 N. H. 551, is a thorough examination of this subject.

II. The more important inquiry is as to the liability of the defendant for damages occasioned by the insufficiency of the bridge at the place of injury. This defendant had its artificial being by an act of the legislature of New Hampshire, and could not do strictly corporate acts without that jurisdiction. But there seems no question that a corporation may act, by its agents and servants, beyond the limits of the sovereignty that created it: 1 Redfield on Railways 57.

If the liability of the defendant were limited by the western boundary of New Hampshire, a traveller who had paid toll, and thereby obtained defendant's contract and guaranty for safe passage across its bridge, would be without remedy for injuries received from defective planking in the westerly end of the main bridge, because the western abutment and western end of the main bridge was without the state of New Hampshire and within Ver-

mont; and that would be relieving the defendant from liability for breach of its contract, implied by taking toll, and from the duties it had assumed to the travelling public, because it occupies, and cannot discharge its proper functions without occupying, a portion of the soil of Vermont. The defendant has occupied the land within this state for its abutment and bridge, and used the same for public travel, for near forty years; and continuously invited travel, for toll, over its structure, without molestation, under a claim of right, and with the implied possession of the sovereignty of this state. And there would seem no good reason, in morals or law, that the defendant should be excused from the performance of its contract by alleging that the duties it had assumed were beyond its corporate functions.

Joint-stock companies, for mining and other purposes, and sometimes for mere mischief, like the "*Credit Mobilier*," often have their corporate life and being from the grant of one state, and exercise their entire functions in another state or territory; yet its contracts are binding on the corporation, though its charter might be vacated, or such acts enjoined by proper proceedings in equity: *Miller* v. *Ewen*, 27 Mo. 509; 1 Redf. on Railw. 57, note.

The Boston, Concord & Montreal R. R. Co. was created by act of the legislature of New Hampshire, yet the corporation has extended its railway some one hundred miles into this state, to a junction with other railways in this state, and have been carrying passengers and freight over that portion of its road for twenty years. The sovereign power of this state was invoked in the Supreme Court to prevent the exercise of such rights, but without avail: *State* v. *B., C. & M. R. R. Co.*, 25 Vt. 443. Although it is the prerogative right of this state to prevent that corporation from operating its railway within this state, yet reason, justice and all analogy would require that such corporation should be responsible for its contracts and the performance of the duties which it assumes, and that a passenger, who had paid his fare from Concord to Wells River, if injured by the actionable carelessness of the corporation, on this portion of its railway, might require it to respond in damages. The corporation could not be excused from doing what, upon sufficient consideration, it had agreed to do, by alleging its incapacity to enter into such a contract. In *McCluer* v. *Manchester & Lawrence R. R. Co.*, 13 Gray 124, the defendant corporation, existing under the laws of New Hampshire, received

goods to carry from some point in Massachusetts to Manchester, N. H., and the goods were lost, by the carelessness of the carriers, in Massachusetts. The defendant alleged in defence that it had no legal capacity to contract, or become responsible as carriers, without the state of New Hampshire. The court (HOAR, J.) held otherwise, and said, "they were in actual possession and *use* of the road, without obstruction from the Commonwealth; and they received the plaintiff's property, and agreed that it should be safely kept and transported to its destination. It is no answer to a breach of that agreement to deny the validity of their own contract." So this defendant, for good consideration, agreed to give safe passage to the plaintiff upon its bridge across Connecticut river; and if plaintiff was injured by the neglect of defendant to keep and maintain its bridge in safe condition, it is neither a just nor legal response to such claim to damages for this broken contract and wrong to such traveller, to aver that there is *doubt* about defendant's right to occupy the land on which the bridge rests. As between the traveller and the defendant, the former has no concern with the defendant's *right* or *title;* it is enough that the corporation was in possession and the traveller paid for the use of the bridge. But it is insisted that the place where the injury occurred is outside the bridge. The place of injury was in the inclined planking, about four feet wide, descending from the level flooring of the main bridge to the road-bed made of earth. This was fastened to the main structure by spikes, and the roof of the bridge extended over and beyond it. It was the transit platform from the main framework of the bridge to land, made by defendant when the bridge was constructed in 1834, and maintained and used by defendant for toll-paying passengers ever since; and without this or some similar provision, it is evident that travellers could not pass and repass with facility or safety. The bridge was imperfect without it.

III. It is insisted that this portion of the bridge is upon and over the highway, as established by law in the town of Newbury, in this state. The record of the highway as established is as follows, viz.: "beginning at the westerly end of the planking in the main bridge over Connecticut river (it being understood and agreed that the proprietors of said bridge always keep in repair the *wharfing* by them made)."

It would seem that the bridge and wharfing had been made and

completed when the highway to meet it was established; and as between the town of Newbury and the defendant, the latter assumed to keep the wharfing to the bridge in repair. Whether the defendant would be liable to a traveller for an injury by reason of an insufficient wharfing, or for the want of a railing on the approaches to the bridge, being a portion of the structure which the defendant is bound to keep in repair, and for the *use* of which toll was taken, the case does not require us to discuss or decide.

This *apron* of the bridge was essentially a part of the bridge. It was constructed with and as a part of it in 1834. It has ever been made fast to the framework of the bridge. It is necessary to enable travellers to pass to the wharfing and upon the highway. It is a necessary part of the structure to enable travellers to pass from the highways of one state to those of another, for which purpose the defendant was incorporated, and for the use of such structure the defendant has for the last forty years taken toll.

The fact that a portion of such structure is over a highway, even if such highway were established without any condition that defendant should ever keep it in repair for the safety of travellers, is no reason why defendant should not perform its contracts or discharge the duties it had assumed.

In *Davis* v. *Lamoille Plank Road Co.*, 27 Vt. 604, it appeared that the defendant, in constructing its plank road, had occupied the established highway in the town of Stowe. By contract with said town, the company had agreed to protect the town from all damages occasioned to travellers by reason of an insufficient road. The corporation defended on the ground that the town were alone liable; but the court held otherwise. And Chief Justice REDFIELD, in giving the opinion of the court, says: "If it could be maintained (which we think it could not) that the town of Stowe were liable for giving up their highway before the defendants had built a proper plank road, it would not excuse the defendants, after opening their road and taking tolls; * * the liability to pay tolls is a consideration for the undertaking, on the part of the corporation, to furnish a safe road for the use of the travellers as an equivalent. It is the same in principle as any other contract where service is performed for pay. There is an implied undertaking, from the general rules of law applicable to such subjects, that the person undertaking such service, whether it be a natural or artificial person, shall perform it faithfully."

The claim of the defendant, that it intruded itself upon another's right, and assumed duties which belonged to another to perform, is no excuse for not performing its contracts and discharging the duties which, for pay, it had assumed. Such a defence is, as Judge HOAR well says, in 13th Gray, *supra*, "like an innkeeper sued for lost luggage, alleging in defence that his landlord was without legal *title*, and therefore he was keeping inn without legal *right*."

An eminent public man in this state, construing the statute strictly, as town auditor, rejected the charge of the overseers for the expense of the *burial* of a town pauper, on the ground that the statute provides for the "*support*," and not the *burial* of the town's poor; that it was a provision for the *living*, and not the *dead*. It is difficult to find fault with this logic. But when the end and purpose of the statute is considered, that decision, subjected to the analysis of the average common-sense layman, would seem unreasonable and absurd. This corporation was authorized to build and keep in repair a bridge across a river, which was the dividing boundary of two states, and take tolls, and nothing more. But when it is considered that the end and purpose of the grant was to afford a feasible and safe transit from the highways of one state to the other, for teams and travellers, and that defendant constructed this appendage to its bridge structure, and made it fast to the bridge and under its roof, and maintained and used it, and invited travel over it for pay, and that for forty years, with his right unchallenged, *as a means of transit* from the highways of one state to the other, as between the corporation and the traveller and patrons who had paid toll, the defendant should be held responsible for the reasonable safety of the means provided for such passage.

We find no error, and the judgment of the County Court is affirmed.

The opinion in this case seems to rest upon such unquestionable grounds that we fear anything we may add, by way of comment or annotation, will have the appearance of an attempt to fortify what does not require it. But this being one of a class of cases considerably numerous in the courts, and to some extent in the reports, where the profession, and sometimes the courts even, seem to feel special satisfaction in devising some plausible grounds for defeating the plaintiff's claim, contrary to its general equity and justice, as if it were evidence of uncommon firmness in adhering to principles at the expense of justice, we may be justified in adding our testimony, as we have often done before, in favor of

following the general obvious justice of a case, where there are no invincible obstacles of a technical character in the way, and of showing our keenness of wit, if anywhere, rather in overcoming technical obstructions than in conjuring them up.

1. There seems to be no fair ground in this case to claim that the place where the defect existed which caused the injury, was not properly treated as a portion of the defendants' bridge. It was in a portion of the platform or passage from the main bridge to the road, which was constructed of planks and fastened by the defendants to the main structure of the bridge with spikes; and was under the cover of the bridge. This would seem to be a sufficient estoppel upon the defendants, to show that they could not deny it being part of the bridge. As between the defendants and the town, it seems very obvious that this place came fairly within the portion of the highway or bridge which it was the defendants' duty to maintain. But this is in fact wholly immaterial, as between the parties to this action. If the defendants took toll of the plaintiff for the use of their bridge, it was wholly immaterial whether they did it rightfully or not, as between them and other parties.

It is settled, by a uniform current of decisions, since the date of the common law almost, that any one in the possession and use of permanent property must keep it in a safe condition, so as not to cause injury to those whom he allows to use it or to come upon it. The rule has been applied to mere strangers, who paid nothing for the use of the same: *Barnes* v. *Ward*, 2 Carr. & K. 661. And the rule applies with special force where the party pays a toll for the use of a turnpike or plank road: *Randall* v. *Cheshire Turnp. Co.*, 6 N. H. 147; *Townshend* v. *Susquehanna Turnp. Co.*, 6 Johns. 90; *Davis* v. *Lamoille Co. P. Road Co.*, 27 Vt. 602. This question was very extensively and learnedly examined in the House of Lords, not many years back, in *The Mersey Docks & Harbor Co.* v. *Gibbs*, Law Rep. 1 Ho. Lds. 93; s. c. 12 Jur. N. S. 571, where it was held that the plaintiffs, although merely a public company, created for building and maintaining their works, for public use, and deriving no private emolument from the tolls collected for the building and repair of these docks, were nevertheless responsible for any injury suffered by any one in such use through default of repair, which defendants ought to have made. And in the very recent case of *Winch* v. *The Conservators of the Thames*, L. R. 9 C. P. 378, it was held that the mere fact of keeping open the tow-path on the upper Thames, and inviting travellers to use it for a toll, imposed the duty upon the defendants, as a public company, to keep the same in safe repair throughout its whole extent, or else to give warning of any existing defects. These public companies, in the last two cases, were held liable to the same extent as private companies doing the same thing. The cases are too numerous to require further citation to show that all turnpike or bridge companies taking toll for the use of their roads or bridges, are responsible for all injuries suffered by travellers through any defects or want of repair in such structures.

2. But it seems to have been claimed in this case that the defendants might excuse themselves by showing that they did not hold any legal title to maintain their bridge beyond the line of New Hampshire. They seemed to have obtained title to the land upon which the portion of the bridge in Vermont stood, and to have maintained the structure upon it, and used it as a portion of their toll-bridge for nearly forty years, more than twice the term of the Statute of Limitations in that state upon rights of entry upon land. This was no doubt perfect title as against all but the state, and would probably have barred even

the state from any proceeding to obtain a forfeiture of the right to maintain that portion of the bridge which was in Vermont, upon the ground of a presumptive grant by the state from such long acquiescence.

But without assuming that point, it is well settled that no such company, exercising the functions of granting passage for toll, whether a bridge or turnpike company, or a railway company, can escape from their otherwise legal responsibility on the ground of holding any portion of their structures by a defective title as against the state: *Feital* v. *Middlesex Ry.*, 109 Mass. 398; *McClure* v. *M. & L. Ry.*, 13 Gray 124; *Bissell* v. *Mich. So. & N. Ind. Ry.*, 22 N.Y. 258. But the rule may be carried much further. The plaintiff is not bound, in order to recover damages for an injury sustained in such case, through the negligence of companies in possession of turnpikes, bridges or railways, and demanding tolls for the use of the same, to prove that the defendants were rightfully entitled to receive such tolls. The fact that the defendants exercised the functions of owners, and received the lawful emoluments as such, is conclusive evidence against them that this was done rightfully. To suppose the contrary, involves an absurdity that few men, not largely schooled in dialectic refinements, could seriously entertain. If one should ride a horse over a child in the street and seriously injure it through mere carelessness, or allow one to enter his premises and fall down a trap-door not properly secured, we should never expect him to attempt to defend himself on the ground that he had not yet acquired full and perfect title to the horse or the farm. But when we come to apply the same reasoning to a public company, there seems to be something which renders it more plausible to allow such a defence than in the case of natural persons. We confess our inability to comprehend wherein the difference lies.

3. But in regard to the claim that the suit should have been against the town, if it could be clearly shown that the town had assumed to extend their highway over the place where the injury occurred, and thus made themselves primarily responsible for its repair, which seems to us not even a plausible construction or contention, in this case there would probably be some who, under such an assumption, might think the action should have been brought against the town. But so long as the injury occurred upon the bridge and its necessary approaches, which constitutes the entire structure for which toll was demanded by and paid to the defendants, they would be estopped to deny in the action that it was their bridge, or to claim that its maintenance and support rested upon any other person, natural or artificial. And it would make no difference in the result if there were no equitable estoppel upon the defendants in regard to recognising their responsibility for the safe condition of the entire structure for which they received toll of the plaintiff, and it were allowable to prove in the action, that some town or towns, or some one else, either in Vermont or New Hampshire, were equally responsible with the defendants, either jointly or independently, for keeping the entire bridge in repair, since it would impose no obligation upon the plaintiffs to go against such parties and not against defendants. It is no defence that other parties are equally liable for the same neglect or wrong for which defendants are sued: *Ricker* v. *Freeman*, 11 Am. Law Reg. N. S. 692; COLT, J., in *Eaton* v. *B. & L. Ry.*, 11 Allen 500; *Burrows* v. *M. G. & C. Co.*, L. R. 5 Exch. 67; s. c. 7 Id. 90. So that in any view we are able to take of the case it seems to rest upon most unquestionable grounds.

I. F. R.

Supreme Court of Errors of Connecticut.

FRANCES C. DOWD *v.* JOSEPH H. TUCKER.

An aunt of the respondent, with whom she lived and to whom by her will she had given all her property, upon her death-bed desired to change her will and give a certain piece of real estate to a niece, and had a codicil prepared for that purpose. Before signing the codicil, she wished to secure the consent of the respondent to the change and had him called in for the purpose. After hearing her, he replied that she was weak and that she need not trouble herself to sign the codicil, but that he would deed the property to the niece and carry out her wishes. Trusting in his promise, she did not change her will. After her death, the respondent refused to convey to the niece. On a bill in equity brought by her to compel him to convey, it was held that he took the property under a trust for her, which a court of equity would enforce.

And held, too, that the case was one of fraud, it being clearly inferable from his refusal to convey after the death of the testatrix, that he made his promise to her with an intention not to perform it.

The procuring of property upon a promise which the party at the time does not intend to perform, is a fraud. And it makes no difference whether the property is real or personal.

BILL IN EQUITY to compel the conveyance of real estate. The following facts were found by a committee:

The petitioner is a niece, and the respondent is a nephew, of Frances M. Hayden, who died September 3d 1870.

On the 27th of May 1863, Mrs. Hayden made a will, by which she gave all her property to the respondent, which will, after her death, was proved as her last will and testament.

At the time of her death, she was the owner of one-half of a dwelling-house and lot, worth $750, being the property in dispute between the parties. She also owned other property, and left an estate, real and personal, after paying all charges, amounting to $2640. From 1863 to the time of her death, she was an inmate, most of the time, of the respondent's family. But she was not a pecuniary burden to him. At times, especially when ill, she went to her own house (which was in the same yard with the respondent's), and was cared for to some extent by the petitioner and her mother. For such services during her last sickness the petitioner has been allowed her claim by the commissioners on the estate, as hereinafter stated.

About two weeks before her death, Mrs. Hayden desired and intended to give to the petitioner her part of the dwelling-house, and to change her will accordingly, but was unwilling to do so without the consent of the respondent. The petitioner thereupon

caused a codicil to be prepared giving to the petitioner the dwelling-house. This codicil was presented to testatrix, upon which she, without signing it, expressed a desire to see the respondent. The respondent was then called into the room, and she informed him that she wanted to give her half of the dwelling-house to the petitioner, if he was willing, and asked him if he was willing, saying again that she wanted to do so. The respondent replied that she was weak, and that she need not trouble herself to sign the paper, but that he would deed the property to the petitioner, and would do just as she wanted to have him. The testatrix expressed herself satisfied that the respondent would do as he agreed, and did not sign the codicil. This interview was on Sunday, about 2 o'clock in the afternoon. Mrs. Hayden was at that time capable of making a will.

The respondent was the executor of her will, and as such represented her estate to be insolvent, and it was settled as an insolvent estate.

The petitioner presented to the commissioners on the estate a claim for $1300. It was a part of her claim that she should be allowed a sum equal to the value of the dwelling-house, on the ground of an alleged promise by Mrs. Hayden that she would give it to her. This claim was rejected by the commissioners on the ground that it was not within their jurisdiction. But they allowed the sum of $150 for services in taking care of the deceased during her last sickness. The sum thus allowed was about $65 more than the services were worth; but the commissioners allowed it in consideration of the circumstances and condition of the parties, hoping thereby to avoid litigation.

After the death of Mrs. Hayden, the petitioner demanded of the respondent that he should execute to her a deed of the premises in question; but he refused, and has ever since refused to do so. The respondent is now in possession of the property, claiming it as his own, and denying that the petitioner has any rights or interest therein.

Upon these facts the case was reserved for the advice of the court.

Chadwick, for the petitioner. — 1. The respondent holds the property as trustee for the petitioner. One who fraudulently procures a bequest to be made to him by a promise as to the use of the legacy, will be held a trustee for such use:

Church v. *Ruland*, 64 Penn. St. R. 432; 1 Story Eq. Jur. §§ 252, 256; 2 Id. § 781; 1 Jarman on Wills 346. And it makes no difference in principle whether one procures a bequest to be made to him, or whether, a bequest having been made to him, he prevents, by a promise, the execution of a codicil giving the property to another. In equity, fraud includes all acts, omissions and concealments by which an undue and unconscientious advantage is taken of another: *Story* v. *Norwich & Worcester R. R. Co.*, 24 Conn. 113. If a committee, without expressly finding fraud, report facts from which an inference of fraud is unavoidably made, the court will treat the transaction as fraudulent: Id. The rule is, that when the facts are ascertained by the report of a committee, the existence of legal fraud is a question of law on facts and intents: *Pettibone* v. *Stevens*, 15 Conn. 26; *Brainerd* v. *Brainerd*, Id. 576; *Lavette* v. *Sage*, 29 Id. 588. The facts found in this case show a clear case of fraud.

2. But if there was no fraud, there was a trust. Property given to one person to be delivered to another, is held by him in trust: 2 Story Eq. Jur., §§ 1041, 1196, 1197, 1201. And land conveyed by deed or any instrument for the benefit of a third person, is held in trust. Such trust may be proved by parol, and equity will enforce it: *Crocker* v. *Higgins*, 7 Conn. 342; *Parsons* v. *Camp*, 11 Id. 528; *Baxter* v. *Gay*, 14 Id. 119; *Church* v. *Sterling*, 16 Id. 388; *Collins* v. *Tillou*, 26 Id. 375.

3. A person for whose benefit an agreement is made, though not a party to the agreement, may maintain a suit in chancery for its specific performance: *Crocker* v. *Higgins*, 7 Conn. 342.

Culver and *Warner*, for the respondent.—The petition proceeds upon the ground that the statute which requires wills to be in writing, would have been complied with, but for the promise of the respondent to deed the property to the petitioner. We admit that, in cases of *fraud*, equity will relieve against the express words of the statute. But to constitute such fraud, there must be deceit or misrepresentation, by means of which the respondent obtained the devise, which would otherwise have gone to the petitioner. It must be deceit or misrepresentation, as distinguished from a mere breach of promise, however wrongful: 2 Lead. Cas. in Equity 708; *Montacute* v. *Maxwell*, 1 P. Wms. 618; 2 Story Eq. Jur., § 781; *Church* v. *Ruland*, 64

Penn. St. R. 432. It is found that, "about two weeks before her death, Mrs. Hayden desired and intended to give to the petitioner her part of the dwelling-house, and to change her will accordingly, but was unwilling to do so without the consent of the respondent." Thus it is plain that the *intention* and *desire* of the deceased were conditioned upon the *consent* of the respondent.

The opinion of the court was delivered by

PARK, C. J.—This case is clearly one of fraud. We have held on the present circuit (*Ayres* v. *French*, not yet reported), in accordance with numerous decisions, that whosoever buys personal property with a preconceived intention not to pay for it, is guilty of fraud. This case is similar in principle. It matters but little whether the property is real or personal estate. Whosoever buys real estate with a preconceived secret intention not to pay for it, but to cheat the grantor out of it, is as much guilty of fraud as he would be if the property was personal estate. Apply this principle to the case we have in hand. The property in controversy belonged to Frances M. Hayden, and while it was yet hers to be disposed of as she pleased, she informed the respondent that she desired to give it to the petitioner if he was willing, and asked him if he was willing, again expressing her desire so to give it. A codicil to her will had been at this time prepared and laid before her ready to be executed. The respondent knew by the inquiry and by the preparation what her purpose was. She had previously, by a duly-executed will, given all her property to the respondent. He knew now that she had changed her mind, and was about to give the real estate in question in legal form to the petitioner, but that she desired his consent to the change, if it could be obtained. He immediately resorted to deception. He substantially expressed his entire assent to the change, but suggested the mode in which it would best be accomplished in her weak condition. He said in effect, let me take the property, as you have already willed it to me, and when it comes into my hands, I will deed it to the petitioner, and in that way your present desire with regard to the disposition of the property will be carried out, as much as it would be by executing the codicil; therefore in your weak condition do not trouble yourself about it. She was satisfied that the petitioner would have the property in the way proposed, and so expressed herself, and consequently the codicil was left

unexecuted; or, in other words, she let him have the property on his promise to convey it to the petitioner.

Now it is a presumption of law that a party intends to do what in fact he does; and the fact appearing in the case that, after the property came into the hands of the respondent, he at all times absolutely refused to convey it to the petitioner, it must be that during some period of time previous to his first refusal he must have so intended; and inasmuch as there is nothing in the case which goes to show a different intention at any previous time, it is reasonable to presume that this intention existed during the short period of time that had intervened since the promise was made, and existed at the time it was made; from which it follows that the promise was made in bad faith, with the dishonest intention to do what he afterwards did. If this was so, then the case is clearly one of fraud. It is the case of one obtaining the conveyance of property by a promise, which he has no intention at the time to fulfil.

But it is unnecessary to pursue this question of fraud, for the case otherwise is palpably one where the respondent holds the property in trust for the petitioner, whether he made the promise in good or bad faith. If *A*, knowing that *B* is about to convey certain real estate to *C*, which the latter has purchased of him, should say to *B*, "Convey the property to me and I will convey it to *C*," and *B* should accede to the request, and convey the property to *A*, no one would question but that *A* would hold the property in trust for *C*. Is this case any different in principle? Mrs. Hayden was on the point of giving this property to the petitioner by the execution of a codicil to her will, which had been prepared. The respondent knowing the fact, said to her in effect, "Let me have the property by the will you have already executed and I will convey it to the petitioner." The respondent by this promise obtained the property. It would seem that no argument need be made to show that he holds it in trust.

But it is said that she did not intend to execute the codicil unless the respondent was willing that she should do so. We do not so understand the report of the committee. But grant that it was so; did he not in the plainest and most unmistakable language give her to understand that he was willing? What did she desire to have done? She wanted the petitioner to have the property. What request did she make of the respondent? She asked him

if he was willing that the petitioner should have it. Whether the conveyance was to be made in one form or another was of no consequence, and formed no part of the substance of the inquiry, although he took it for granted that she intended to do it by executing the codicil that lay before her, which was in fact her intention. What reply did he make? He said that she was weak, that she need not trouble herself to sign the paper (meaning the codicil), that he would deed the property to the petitioner, and would do just as she wanted to have him; that is, I will do just what you ask my consent to have done; therefore do not trouble yourself in your weak condition to execute the codicil. If this language does not convey a consent that the petitioner should have the property, then language in any form of words would fail to express the idea.

It follows, therefore, that the respondent obtained the property in question by his promise to convey the same to the petitioner, and consequently we think he is bound in equity and good conscience to make the conveyance.

We advise the Superior Court to grant the prayer of the petition.

The foregoing case is decided upon a clearly-established rule of law, that where the devisee of an estate induces the testator to omit making further testamentary disposition of the estate so devised, by representing that he will dispose of the estate so devised in a particular manner in conformity with the wishes of the testator expressed to the devisee, the testator omitting to make further disposition of the estate by reason of his confidence that the estate will, after his decease, be by the devisee conveyed according to the assurances given by him. Equity will compel such conveyance upon the petition of the party to be benefited thereby. It is upon the ground that the law compels the fraudulent devisee to stand as trustee for the party entitled. The law raises a trust to the extent of the fraud, the same as if the trust had been expressed in the devise. The precise point was decided in an early case: *Devenish* v. *Baines*, Prec. Ch. 3. And the same principle is declared in *Oldham* v. *Litchford*, 2 Vern. 506; and in *Barrow* v. *Greenough*, 3 Ves. Jr. 152; *Chamberlain* v. *Agar*, 2 Ves. & B. 262; *McCormic* v. *Grogan*, L. R. 4 H. Lds. 82; *Norris* v. *Frazer*, L. R. 15 Eq. 318. And some American cases have taken the same view: *Chamberlaine* v. *Chamberlaine*, Freem. Ch. 34; *Nutt* v. *Nutt*, 2 C. & P. 430; *Yates* v. *Cole*, 1 Jones Eq. 110. See also 1 Story Eq. Jur. § 105 *a*. The question is learnedly discussed in *Williams* v. *Fitch*, 18 N. Y. 547; Redf. Lead. Am. Cases on Wills 607, and the same views maintained.

But as it is well settled that courts of equity cannot reform a will so as to give it the effect intended, we should not be surprised to find a very general impression among the profession that equity does not interfere to give effect to the intentions of the testator in any case, where for any reason he has omitted or failed to express such intention in the mode prescribed in the Statute of Wills. But there can be no question in regard

to cases of the same character with the principal case. So, too, it has been held, that one may make a binding contract to dispose of a portion, or all his estate, in a particular manner by his will, as in the case of marriage settlements, and that a court of equity will carry the contract into effect after the decease of the testator, or even before probably, except as the party, unless limited in time by the terms of the contract, would have all his lifetime to make his will according to the stipulations of his contract, and consequently a bill during his lifetime for specific performance of the contract, would be held premature: *Johnson* v. *Hubbell*, 2 Stock. Ch. 332. We regard the case as one of special interest, in consequence of the principle involved being one of importance, and at the same time not so fully understood by the profession at large as many others of far less significance. I. F. R.

Supreme Court of the United States.

THE LOTAWANNA.

It is settled by repeated adjudications of this court, that material-men furnishing repairs and supplies to a vessel in her home port do not acquire thereby any lien upon the vessel by the general maritime law as received in the United States.

Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own.

In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended, and referred to when it was declared in that instrument, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.

The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no state law or Act of Congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

Semble, That Congress, under the power to regulate commerce, has authority to establish a lien on vessels of the United States in favor of material-men, uniform throughout the whole country.

In particular cases, in which Congress has not exercised the power of regulating commerce, with which it is invested by the Constitution, and where the subject does not in its nature require the exclusive exercise of that power, the states, until Congress acts, may continue to legislate.

Hence, liens granted by the laws of a state in favor of material-men for fur-

nishing necessaries to a vessel in her home port in said state are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceedings *in rem* in the District Courts of the United States.

Any person having a specific lien on, or a vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the 43d Admiralty Rule.

Separate libels were filed in 1871, against a steamboat, for wages, for salvage, for supplies furnished at her home port, and for the amount due on a mortgage: *Held*, On the evidence, that the lien for supplies had not been perfected under the state law; and, if it had been, that the libels for such supplies could not be sustained prior to the recent change in the 12th Admiralty Rule: *Held*, also, That the libel upon the mortgage could not be sustained as an original proceeding, but that the mortgagees having petitioned for the surplus proceeds of the vessel, were entitled to have the same applied to their mortgage.

APPEAL in admiralty from the Circuit Court for the District of Louisiana.

The libel was filed in the District Court of the United States on June 10th 1871, by William Doyle and another, against the steamer Lotawanna, of New Orleans, for mariners' wages. The vessel being seized, libels of intervention were afterwards filed by various parties, some for mariners' wages, some for salvage services, some for supplies, materials and repairs furnished in the port of New Orleans, for the use of the steamer. On June 20th 1871, Catharine Rodd, administratrix, and others, filed a libel of intervention by which they set up a mortgage on the vessel, given to them by the owner, on May 20th 1871, and duly recorded in the custom-house on May 22d, to secure the payment of various promissory notes of the same date, given to said libellants by the said owner, and amounting to more than $14,000.

The steamer, up to the 16th of May, had been engaged in the river trade on the Mississippi and Red rivers, between New Orleans and Jefferson, in Texas, and was laid up for repairs at New Orleans on that day. Most of the claims for wages and supplies arose before the date of the mortgage, although some arose afterwards. The steamer was sold for $7500, and, after deducting expenses of sale, costs, salvage and wages of mariners (which were admitted to have preference), there remained a surplus of $4644.42, which the District Court decreed to be paid *pro rata* to the mortgage-creditors, to the exclusion of the claims for repairs and supplies. This decree was reversed by the Circuit Court, on appeal, and the surplus was decreed to be paid *pro rata* to the claimants for repairs and supplies, to the exclusion of the mortgage-

creditors, the amount not being sufficient to pay either class of creditors in full. From the latter decree an appeal was taken to this court.

The case was argued at December Term 1873, by *T. J. Semmes*, for the appellant, and *J. A. Grow* and *L. M. Day*, for the appellees; and again at October Term 1874, by *R. Mott*, for the appellant, and *J. A. Grow*, for the appellees, and by *W. W. Goodrich*, in favor of the lien for supplies furnished a vessel in her home port, and by *William Allan Butler* and *Andrew Boardman*, in opposition to such lien.

The opinion of the court was delivered by

BRADLEY, J.—The principal questions raised in this case were decided by this court adversely to the lien more than fifty years ago in the case of *The General Smith*, 4 Wheaton 438, and that decision has ever since been adhered to, except occasionally in some of the District Courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land, ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law. The additional security which has been extended to bills of sale and mortgages on ships and vessels since the passage of the act for recording them in the custom-house; and the confidence with which purchasers and mortgagees have invested money therein under the existing course of decisions on this subject, have placed a large amount of property at undue hazard, if those decisions may lightly, or without grave cause, be disturbed.

The ground on which we are asked to overrule the judgment in the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as

well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all the state laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together as it is, by mutual relations of trade and intercourse, demands that, in all essential things, wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the

general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that, in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes.

This view of the subject does not, in the slightest degree, detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon

the just and logical grounds upon which it is accepted, and, with proper qualifications, received with the binding force of law in all countries.

The proposition, therefore, that by the general maritime law a lien is given in cases of the kind now under consideration, does not advance the argument a single step, unless it be shown to be in accordance with the maritime law as accepted and received in the United States. It certainly has not been the maritime law of England for more than two centuries past; and whether it is the maritime law of this country depends upon questions which are not answered by simply turning to the ordinary European treatises on maritime law, or the codes or ordinances of any particular country.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England; or lastly, such modification of both of these as was accepted and recognised as law in this country. Nor does the Constitution attempt to draw the boundary-line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the

Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice TANEY, delivering the opinion of the court in the case of *The St. Lawrence*, 1 Black 526, 527, where he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it, nor can an Act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government."

Guided by these sound principles, this court has felt itself at liberty to recognise the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice TANEY intimates, ex-

clusively a judicial question, and no state law or Act of Congress can make it broader or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should for ever remain unalterable. Congress undoubtedly has the authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of material-men in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication.

On this subject the remarks of Mr. Justice NELSON, in deliver-

ing the opinion of the court in *White's Bank* v. *Smith*, 7 Wall. 635, 656 (which established the validity and effect of the act respecting the recording of mortgages on vessels in the custom-house), are pertinent. He says: "Ships or vessels of the United States are creatures of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the Act of September 1st 1789; and those which, after the last day of March 1793, shall be registered or enrolled in pursuance of the Act of 31st December 1792, and must be wholly owned by a citizen or citizens of the United States, and be commanded by a citizen of the same." * * * * "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction." This case was subsequently affirmed by *Aldrich* v. *Ætna Co.*, 8 Wall. 491.

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which it is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them.

This disposes of the principal question in the case.

But it is alleged by the appellees that by the law of Louisiana they have a privilege for their claims, giving them a lien on the vessel and her proceeds; and that the court was bound to enforce this lien in their behalf, though not strictly a maritime lien.

On examining the record, however, it appears that the appellees never caused their lien (if they had one) to be recorded according to the requirements of the state law. By the 123d article of the Constitution of Louisiana, adopted in 1869, it is declared that no "mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated." And an Act of the Legislature, passed since that time, adopts the

very terms of the constitutional provision. And a further act provides that if the privileges be not in writing, the facts on which it is based must be stated in an affidavit, which must be recorded (Revised Civil Code, articles 3273, 3274, 3093). None of these requisites having been performed, no lien can be claimed under the state law.

But if there were any doubt on this subject, the case of the appellees is met by another difficulty. The admiralty rule of 1859, which precluded the District Courts from entertaining proceedings *in rem* against domestic ships for supplies, repairs or other necessaries, was in force until May 6th 1872, when the new rule was promulgated. Now, this case was commenced in the District Court a year previous to this, and final judgment in the District Court was rendered two months previous. It is true that the judgment of the Circuit Court, on appeal, was not rendered until the 3d day of June, 1872; but if the new rule had at that time been brought to the attention of the court, it could hardly have been applied to the case in its then position. All the proceedings had been based and shaped upon other grounds and theories, and not upon the existence of that rule. It would not have been just to the other parties to apply to them a rule which was not in existence when they were carrying on the litigation.

As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure.

Had the lien been perfected, and had the rule not stood in the way, the principles that have heretofore governed the practice of the District Courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material-men to file a libel against the vessel or its proceeds. *The General Smith*, 4 Wheat. 438; *Peyroux* v. *Howard*, 7 Peters 324; *The Orleans* v. *Phœbus*, 11 Id. 175; *The St. Lawrence*, 1 Black 522. It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each state by state

legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws. The practice may be somewhat anomalous, but it has existed from the origin of the government, and, perhaps, was originally superinduced by the fact that prior to the adoption of the Constitution, liens of this sort created by state laws had been enforced by the state courts of admiralty; and as those courts were immediately succeeded by the District Courts of the United States, and in several instances the judge of the state court was transferred to the District Court, it was natural, in the infancy of federal legislation on commercial subjects, for the latter courts to entertain jurisdiction over the same classes of cases, in every respect as the state courts had done, without due regard to the new relations which the states had assumed towards the maritime law, and admiralty jurisdiction. For example, in 1784 the Legislature of Pennsylvania passed a law allowing persons concerned in building, repairing, fitting out and furnishing vessels for a voyage, to sue in admiralty, as mariners sue for wages. Two cases, those of *The Collier*, and *The Enterprise*, arising under this law, and coming before the Admiralty Court of Pennsylvania, are reported in Judge HOPKINSON'S works, volume 3, pp. 131, 171. No doubt other cases of the same kind occurred in the courts of other states.

But, whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity.

It is true that the inconveniences arising from the often intricate and conflicting state laws creating such liens, induced this court in December term 1858, to abrogate that portion of the 12th Admiralty Rule of 1844 which allowed proceedings *in rem* against domestic ships for repairs and supplies furnished in the home port,

and to allow proceedings *in personam* only in such cases. But we have now restored the Rule of 1844, or, rather, we have made it general in its terms, giving to material-men in all cases their option to proceed either *in rem* or *in personam*. Of course this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel.

It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions.

Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by state laws until Congress interposes and thereby excludes further state legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of state laws. And yet this exercise by the states of the power to regulate pilotage has not withdrawn the subject, and, indeed, cannot withdraw it from the admiralty jurisdiction of the District Courts: *Cooley* v. *Port Wardens*, 12 How. 299; *Ex parte McNeill*, 13 Wall. 236. And, of, course, as before intimated, this jurisdiction of the state legislatures in such cases is subject to be terminated at any time by Congress assuming the control. In some cases this is not so desirable as in others, but in the one under consideration, if Congress has the power to intervene, it is greatly to be desired that it should do so. It would be better to have the subject regulated by the general maritime law of the country than by differing state laws. The evils arising from conflicting lien laws passed by the several states are forcibly set forth by Chief Justice TANEY in the case of *The St. Lawrence*, before cited. It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages, and a uniform law by which the liens in question should be required within a reasonable time to be placed on record in the custom-house like mortgages, and otherwise properly regulated, would be of great advantage to the business community.

But there is another mode in which the appellees, if they had a valid lien, could come into the District Court and claim the benefit

thereof, namely, by a petition for the application of the surplus proceeds of the vessel to the payment of their debts, under the 43d Admiralty Rule. The court has power to distribute surplus proceeds to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated: *Schuckardt* v. *Babbidge*, 19 Howard 239. The propriety of such a distribution in the admiralty has been questioned on the ground that the court would thereby draw to itself equity jurisdiction: 3 Knapp's Privy Council 111. But it is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund rightfully in its possession to those who are legally entitled to it; and there is no sound reason why admiralty courts should not do the same. If a case should be so complicated as to require the interposition of a court of equity, the District Court could refuse to act, and refer the parties to a more competent tribunal. See cases reviewed in 1 Conklin's Admiralty 48–66, 2d ed.

In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the 43d Admiralty Rule, and in the manner above indicated. Their libel was inadmissible, even under the admiralty rule as recently modified: *The John Jay*, 17 Howard 399. But before the final decree they filed a petition for the surplus proceeds, and, as there is no question in the case about fraudulent preference under the bankrupt law, they are entitled to those proceeds towards satisfaction of their mortgage.

The decree of the Circuit Court is reversed, and it is ordered that the record be remanded, with instructions to enter a decree in favor of the appellants, in conformity with this opinion.

CLIFFORD and FIELD, JJ., dissented.[1]

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[1] We have been favored also with a copy of the elaborate dissenting opinion of CLIFFORD, J., and regret that want of space prevents our publishing it herewith.—ED. AM. L. R.

Supreme Court of Alabama.

PARKS ET AL. *v.* COFFEE ET AL.

The states that joined the Confederate government continued notwithstanding that act to be states, and their governments, legislatures, courts, officers, &c., when regularly and duly constituted according to their own laws, as in the case of Alabama, were officers *de jure* as well as *de facto*.

The acts of the several states in their individual capacities, and of their departments of government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the Constitution, were valid and binding.

The courts of Alabama, during the war, were a portion of the rightful *de jure* government of the state; and their judgments, decrees and proceedings, not in violation of the Constitution and laws of the United States or of any right or obligation arising under them, and not in violation of the Constitution of Alabama, are valid and must have operation and effect accordingly.

No act of the legislature or ordinance of a convention is necessary to such validity.

A judgment in an Alabama court in 1861, in a suit between persons within its jurisdiction, and a subsequent sale of land under execution on that judgment, passed a good title to the purchaser.

BILL for injunction. Appellants were in possession of certain land purchased in October 1866, at a sheriff's sale under a *pluries* writ of execution upon a judgment of the Circuit Court of Jackson county, rendered in 1861, during the late war, against Wallace and Chitty. The land belonged to defendant Chitty. A writ of execution, on which the costs and interest were made, was issued on this judgment in 1862; another was issued June 28th 1866; and next in order to this, without the lapse of a term, was the *pluries* writ, under which the sale was made.

Appellants claimed the land under another title also. In March 1866, it was attached by the sheriff of Jackson county, by virtue of a writ of attachment in a suit of Falls and Cunningham against Wallace and Chitty, in which judgment was rendered in 1867 in favor of the plaintiffs; and appellants show a sheriff's deed to them, as purchasers of the same land under this judgment also.

The appellee, who was defendant in this cause below, had caused this same land to be attached in September 1866, under a writ of attachment in a suit of his own against said Chitty; and having afterwards obtained a judgment therein, he was pressing a sale of the land under an execution upon the judgment.

The opinion of the court was delivered by

MANNING, J.—The bill in this cause was filed by appellants, for an injunction against the proceeding by appellee, and to remove the cloud it cast upon their title. And as under the decisions of this court after the reconstruction of it in 1868, judgments rendered during the war were held incapable of sustaining execution on them, and of creating liens upon property, after the war—the struggle of the parties to this cause was, on the part of the appellee, to assail the title of appellants under the second judgment rendered after the war, and on the part of appellants, to maintain that title. It is not necessary, however, to review the evidence relating to this contest (which occupies a large part of the record), if under the later decisions of this court, and in our opinion, judgments rendered during the war, are not, for that reason, invalid.

For the appellee, it is insisted, that, according to the decisions of our immediate predecessors, judgments rendered in the courts of Alabama during the war, are to be considered as having no other effect than as the judgments of foreign courts, of which, as such, execution could not now be had in our courts. Such decisions were made; but they were afterwards modified by the same, or some of the same judges, who made or concurred in them.

The times, indeed, were not then favorable to the formation of correct opinions. Everything was disestablished The Confederate government, with all its departments, offices and great powers, had gone down before men's eyes, and was seen no more. The state governments were toppled over; and military administrations were set up in their stead. To these succeeded civil governments, that had been solemnly instituted by delegates from the people assembled in conventions. These again were overturned and denounced as illegal, by the Acts of Congress, known as the Reconstruction Laws, and others were established to take their places.

We are only referring to these events, not criticising them. It does not come within the scope of our duties on this bench, to pass judgment on the conduct or policy of any of the actors in those tragic scenes. But there was a general instability of the most important institutions of society. And in the conflict of passions and interest by which it was produced, principles became indistinct, and the minds of men possessed by lawless and extravagant ideas.

That much greater evil, than that we have hitherto suffered, did not result from this condition of things, is largely due to the moderation, wisdom and learning of the Supreme Court of the United States. The influence of its action has been felt in all the courts of the land. And it is by the light which that tribunal has shed upon the subject, that we propose to proceed in our investigation of the questions—what authority is due to the judgments and decrees of the courts of Alabama rendered during the war, and what was the *status* of those courts?

In 1867, the case of *Walker* v. *Villavaso*, 6 Wall. 124, came before that court. The facts concerning it, are these: In 1861, Louisiana had (according to the report of the case) "passed an ordinance of secession from the Union, adopted the Constitution of the rebel states, required all office-holders to swear allegiance to it, and had been proclaimed in a state of insurrection by the President of the United States." After this, in October 1861, a decree for the foreclosure of a mortgage, and sale of the mortgaged property, was made by a District Court of that state. In 1867, after the war was over, this decree was affirmed by the Supreme Court of Louisiana, then reconstituted and a loyal court. In the Supreme Court at Washington, it was insisted, that it must take judicial cognisance of the facts mentioned, which (as it was urged) made the decree of the District Court void, as that of an insurrectionary court under a political organization hostile to the United States, and so must judicially know that the Appellate Court of Louisiana, in affirming that decree, decided adversely to the proposition that it was void for that reason, wherefore the Supreme Court of the United States should take jurisdiction of the cause.

But it held, in a brief opinion, that this matter not appearing by the record to have been in controversy below, the cause could not be brought before it, under the Judiciary Act of 1789, and it was, therefore, dismissed. This left the original decree below (rendered when Louisiana, as one of the Confederate states, was waging war against the Federal government) to be carried into effect upon the recognition and affirmance of it, as valid, after the war, by the Supreme Court of Louisiana.

At the same term (December 1867) of the Supreme Court at Washington, the question came up in a different form in *White* v. *Cannon*, 6 Wall. 443. This also was from the Supreme Court of

Louisiana. But this time, it was that court, and not the inferior one, that was the "Rebel court." And it had, after the ordinance of secession of Louisiana had been passed, reversed the judgment of an inferior loyal court, and rendered a different one in its stead.

Upon the argument of it at Washington, it was suggested to the court that the decree of the Appellate Court below was void, because rendered after the secession of Louisiana from the Union. But the Supreme Court of the United States, after reviewing the case, affirmed the decree, and briefly said in conclusion: "The objection that the decision of the Supreme Court of Louisiana is to be treated as void, because rendered some days after the passage of the ordinance of secession of that state, is not tenable. That ordinance was an absolute nullity, and of itself alone neither affected the jurisdiction of that court or its relations to the appellate power of this court."

At the next term, came up the great case of the *State of Texas* v. *White*, to which we shall recur hereafter.

In the Circuit Court of the United States at Mobile, in June 1871, Justice BRADLEY, of the Supreme Court, presiding, delivered the opinion in the case of *Lockhart et al.* v. *Horn, Ex., &c.*, then there. This was a suit in equity to set aside a will which had been established in a Probate Court of Alabama, and for the settlement of an administration.

In it he said: "The complainant relies on several grounds for the suspension of the limitation: first—the fact that civil war was raging in Alabama and other states, from January 11th 1861, when the act of secession was adopted, to the close of hostilities and restoration of order, in the summer or fall of 1865.

"I do not agree that this was a sufficient ground for the suspension of legal remedies and acts of limitations, as between the citizens of the Confederate States, any more than it would be as between citizens of states which adhered to the General Government. It is a fact that the courts of Alabama were open to all the citizens of the Confederate States, and there was no law to prohibit them from resorting thereto. * * * * * Unless a country is actually occupied by hostile forces and its laws and courts are suppressed, it would be giving to the courts too large a discretion to allow them to decide when and when not, the Statutes of Limitation are in operation, as between their own citizens."

Having, after reviewing all the grounds, decided that complainants were not excusable for not having brought suit during the war, in the courts of Alabama, and were therefore, barred of a part of the relief they claimed, Judge BRADLEY had next to meet the question of the liability of the executor for funds of the estate which, in 1864, he had invested in bonds of the Confederate States. In reference to this he says: "As a general rule, in my judgment, all transactions, judgments and decrees which took place in conformity with existing laws, in the Confederate States, between the citizens thereof, during the late war, except such as were directly in aid of the rebellion, ought to stand good. The exception of such transactions as were directly in aid of the rebellion, is a political necessity required by the dignity of the United States government, and by every principle of fidelity to the Constitution and laws of our common country."

Having decided that the investment in Confederate bonds was directly in aid of the rebellion, and that, therefore, the executor could have no benefit from that act—the final question was, whether the executor should be liable for the funds he had so invested, as good money, or for their value at the time, as Confederate treasury notes, he having received payment in them as the currency then in common use. It appeared that the executor took office in March 1858; that the debts from which those funds arose, were due before the war began; and that he was urged and cited to settle the estate in August 1860, and again in January 1861; and "he has not shown" (says Judge BRADLEY) "sufficient excuse for not collecting the funds of the estate before the war commenced. Had he shown such excuse, I should have felt bound to charge him only with the value of the funds at the time when he received them, with a reasonable allowance of time for making a settlement." "It may be urged" (continued the judge) "that the decree of the Probate Court made in May 1864, is conclusive on the question of the executor's diligence. * * * * * * But a careful examination of that decree shows that this question was not passed upon by the court. * * * *Had the court decided* the question of diligence I should have deemed *its decision on that point conclusive.*" These large extracts are made because this opinion of Judge BRADLEY is believed not to be yet published in any book of reports, and because of its great value in showing how fully and emphatically the eminent judges of the highest

court in the land acknowledge the validity and authority (when not in conflict with the Federal Constitution) of the laws, judicial proceedings and governmental institutions of the states of the late Southern Confederacy during the war. In affirming the decree in this case the Supreme Court of the United States say, "We admit that the acts of the several states in their individual capacities, and of their departments of government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the Constitution, are in general to be treated as valid and binding.

"The existence of a state of insurrection and war did not loosen the bonds of society or do away with civil government or the regular administration of the law; order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states, touching these and kindred subjects, when they were not hostile in their purpose, or mode of enforcement, to the authority of the national government and did not impair the rights of citizens under the Constitution:" *Horn* v. *Lockhart et al.*, 17 Wall. 580.

In harmony with these declarations of the law is the opinion in *Texas* v. *White*, 7 Wall. 700, as explained in *Huntington* v. *Texas*, 16 Wall. 402. Quotations to this point from these cases are needless, and would too much extend this opinion.

But while the validity and authority of the acts, judgments and decrees of the several departments of the state governments during the war are so fully and emphatically affirmed, it is nowhere expressly held that those governments were, during that period, the rightful, legitimate governments of these states. On the contrary, in *Texas* v. *White*, *supra*, the Chief Justice, *arguendo*, says: "The legislature of Texas, at the time of the repeal, constituted one of the departments of a government established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States as a lawful legislature or its acts as lawful acts. And yet it is an historical fact that the government of Texas, then in full control of the state, was its only actual government, and certainly if Texas had been a separate

state and not one of the United States, the new government, having displaced the regular authority and established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted in the strictest sense of the words a *de facto* government, and its acts during its existence as such would be effectual and in almost all respects valid. And to some extent this is true of the actual government of Texas, though unlawful and revolutionary as to the United States."

The Chief Justice then goes on, without intending (as he says) to be full and exact, to speak of the acts of such a government which must be treated as valid, and concludes by saying "that acts in furtherance or support of rebellion against the United States or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void," which, accompanied by the explanation made in *Huntington* v. *Texas*, *supra*, corresponds with what we have before quoted from *Horn* v. *Lockhart*, 17 Wall. 580.

Of the paragraph above from the opinion in *Texas* v. *White*, without adverting to its defective logic, two things are to be noted. First, The Chief Justice had previously mentioned that the Governor and Secretary of State of Texas, having refused to take an oath of allegiance to the Confederate States, "were summarily ejected from office." And since he speaks in the passage above, of "the *new* government having displaced the regular authority," &c., we must infer that he had in mind this government, referred to as established by actual usurpation, when he was speaking of its *status* and authority. And secondly: All those acts which he says "must be regarded as invalid and void," if done by the "actual government of Texas, though unlawful and revolutionary as to the United States," would be equally "invalid and void," if done by the lawful and regular government, before secession from the United States.

Hence no support is afforded by that opinion, to the proposition, that the government of Alabama (which was not established by the expulsion of any person from office, and the introduction of an usurper in his place), *was not* the government *de jure* of this state during the war. But other portions of that opinion enable us to demonstrate the contrary.

"We have already," says the Chief Justice, "had occasion to remark, at this term, that the people of each state compose a state

having its own government and endowed with all the functions essential to separate and independent existence; and that without the states in union, there could be no such political body as the United States:" *County of Lane* v. *The State of Oregon*, 7 Wall. 76. "Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union, composed of indestructible states."

These are noble sentences.

Before the war then and while in the Union, Alabama was endowed with autonomy. Her people composed "a state having its own government, and endowed with all the functions essential to a separate and independent existence." Those who constituted this government, were elected into it by this people. They were not appointees of any officials of the United States. Their tenure of office did not depend upon any Federal functionary. They could not be deposed, or their places supplied, by the action of any one from without the state. In fine, they composed a government created by the people of Alabama, for the enactment and enforcement of the laws of this people, were responsible for their official acts only to this people, could be succeeded in office only by those whom this people should elect, and possessed rightfully, *de jure*, all the powers of government, except those which were denied to them by the Constitution of Alabama and the Constitution of the United States. The rightful government thus constituted and thus endowed with the powers and faculties of administration which Alabama had before, and when the act of secession was passed, continued without change, except by the regular election or appointment of successors to the persons whose terms of office expired, down to the close of the war. If any of its members ceased to be lawful members of the government while they acted as such, and became merely *de facto* members of it, or only actual members, they were then usurpers of the seats of authority which belonged to others. Who were those others, that were thus expelled or kept out? Who claimed to be so? Who, if the incumbents had vacated their offices, would have had the

right, or claimed that they had the right, to take and occupy them?

These questions cannot be answered. And why not? Because the incumbents of those offices were not usurpers of them, but rightfully in possession.

Is there some dim idea, however, that although this be true of the persons exercising authority, yet the state government itself with its departments and offices had become defunct? How could this happen? Whether in the Union or out of it, Alabama did not cease to be a state. Some of her elder sisters were states with their separate and independent governments, before the Union under the Constitution was formed; and any or all of them might continue to be so, if the Union were utterly dissolved. To the political community denominated a state the organization which we call government, is essential; it is of the substance of it, and a part of the idea which the word expresses. And such an organization was certainly quite as necessary to Alabama, while dissevered from her co-states, as while in union with them. This is indeed affirmed, or recognised, in most of the passages which we have quoted from cases in the Federal courts. The latest of those in the Supreme Court at Washington, relating to this matter, is that of *Sprot* v. *United States*, decided at the present term. (See report in the January No. 1875 of the American Law Register.) MILLER, J., in delivering the opinion of the court and speaking of the difference between "the so-called Confederate government and that of the states," says: "the latter, in most if not in all instances, merely transferred the existing state organizations to the support of a new and different national head. The same Constitution, the same laws for the protection of property and personal rights remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same with slight exceptions whether the authorities of the state acknowledged allegiance to the true or the false federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration, under whatever temporary dominant authority they may be exercised."

Anything more conclusive upon this point, it would be needless to produce. But we may add that it having been repeatedly held by the highest court in the land, that the acts and ordinances of

secession were mere nullities, absolutely void, and all the efforts made in support of them, having proved ineffectual, it follows that legally, in contemplation of law, Alabama was never out of the Union. The Constitution and laws of the United States, though their operation was suspended, continued obligatory within her borders during all the time of the war, and she continued to be a member of what the Constitution in all its provisions designed to be "an indestructible Union composed of indestructible states."

Of course, we are not to be understood as holding that because the courts and legislatures of Alabama, during the war, were such rightfully *de jure*, therefore whatever they did was lawful. Suppose, for the sake of the argument, that the persons exercising public functions, employed them in doing many illegal acts, even treasonable ones. What then? Concede that they became liable to be, and were pursued, driven from office and punished by the Federal Government, and that their official acts of that character must be treated as null and void. All this would not prevent the things which they had officially done that were not in violation of superior laws, or of the rights and obligations arising under such laws, from being valid and effectual, any more than the crimes of Charles I., and his decapitation for them, or those of James II. for which England dethroned and expelled him, invalidated the acts which they had lawfully done while they yet actually swayed the sceptre, as kings *de jure* of the realm.

Our conclusion then is, that the courts of Alabama, during the war, were a portion of the rightful, *de jure*, government of the state; and that their judgments, decrees and proceedings, not in violation of the Constitution and laws of the United States, or of any right or obligation arising under them, and not in violation of the Constitution of Alabama, are valid and must have operation and effect accordingly.

We have heretofore mentioned that the views of our predecessors on this point as expressed in *Hall* v. *Hall*, 43 Ala. R. 488; *Powell* v. *Boon*, Id. 459; *Martin* v. *Hewitt*, 44 Id. 418, and in other cases, have been modified by later decisions. We refer to the cases of *Tarver* v. *Tankersly*, *Powell* v. *Young*, and *Riddie* v. *Hill*, delivered at the last (June) term of this court.

In them, it was held, conformably with the opinion of the Supreme Court of the United States, in *Horn* v. *Lockhart*, *supra*, that "judicial proceedings in this state during the war, so far as

they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are to be treated as binding.

This rectification of the judicial opinion of this court, gave great satisfaction to the lawyers and people of the state. Its tendency was to prevent litigation from being fomented, and the peace of families from being disturbed.

We have gone a step further (we hope with like beneficent consequences), in holding that the courts in which those judicial proceedings were had, were a part of the rightful government of the state.

One consequence of this holding is—that no act of the legislature, or ordinance of a convention, is necessary to give validity to the judgments, decrees and proceedings of those courts.

Another consequence is that the records and papers of those courts during the war, are to be preserved with the same care, and certified in the same manner, as those of courts held since; and like punishments are to be inflicted for the destruction, mutilation, abstraction or falsification of the records and papers of the one, as of the other.

According to our views, the title of the land in controversy acquired by appellants, under a judgment rendered during the war, the execution upon which created a lien commencing at an earlier date than that created by the attachment for appellee, is valid. And the proceedings of the appellee to have the land sold under the judgment in his suit, are injurious to appellants, and cast a cloud upon their title.

The decree of the Chancellor is reversed, and a decree will be here rendered perpetually enjoining appellee from further proceeding to sell the land in controversy to satisfy his judgment.

Appellee will pay the costs of this suit in this court and in the court below.

BRICKELL, C. J., did not sit in this case.

United States Circuit Court. Northern District of Illinois.

OSGOOD *v.* CHICAGO, DANVILLE & VINCENNES R. R. CO. ET AL.

Under the Act of Congress of March 3d 1875, the Circuit Courts have jurisdiction of actions between citizens of different states, without regard to the fact that one party may be a citizen of the state where the suit is brought; and under

this act such cases may be removed from a state court even by a defendant who is sued in a court of his own state.

Where there are several defendants, only part of whom ask for the removal of a cause to a Federal court, the right to such removal depends on the fact whether or not there is a controversy wholly between the plaintiff and the defendants asking for the removal, and which can be fully determined as between them.

A bill was filed in an Illinois court by a citizen of Massachusetts, against an Illinois corporation and its officers, and certain judgment-creditors, who were citizens of Illinois, to enforce the lien of certain bonds, and to foreclose a mortgage given to secure them. The judgment-creditors, defendants, filed cross-bills, and there was a demurrer to the bill. The corporation and some of its officers, including president, treasurer and several of the trustees under the mortgage, then filed a petition to remove the cause to the Circuit Court. *Held*, that this was a controversy wholly between citizens of different states which could be fully determined as between them, and therefore was properly removable.

Held, further, that the fact that certain judgment-creditors whose rights were subject to the prior liens of the bonds sought to be enforced, were defendants, and that some of them had filed cross-bills, could not affect the right of the substantial parties to the issue to remove the cause.

Where there has been a possession of the *res* acquired by the state court in consequence of the main issue, the removal of the latter carries with it the possession of the *res* to the Federal court, notwithstanding there may be collateral issues raised which may remain in the state court.

Whether such collateral issues do remain in the state court or are removed by the removal of the main controversy, not decided.

A petition for removal under the Act of 1875, may be filed in vacation, and it is not required that the state court should take any action upon it or upon the bond.

If the petitioner has the right of removal and files his petition and then files a copy of the record in the Federal court, the act of removal is complete, and the only jurisdiction to restore the case to the state court is in the Federal court upon motion.

On the 22d of February 1875, the plaintiff, as a bondholder of the railroad company, filed a bill in the Will county Circuit Court, against the company and certain defendants (trustees of mortgages amounting to several millions of dollars, given by the railroad company, including the president and treasurer and members of the board of directors), to foreclose the mortgage. The bill charged various breaches of trust on the part of the officers of the company, and asked for an injunction to prevent them from negotiating certain bonds of the company, and for a receiver. The court, without notice to the defendants, issued the injunction and appointed receivers at the time the bill was filed. On the 23d of February, a petition was filed by some of the non-resident defendants to remove the suit into this court, which was refused by the state court. On the 24th of February, the bill was amended by making

various judgment-creditors defendants. On the same day, one of the judgment-creditors answered and filed a cross-bill praying the court to enforce the lien against the company, and that the receivers should pay the same. On the 26th of February, on petition, other creditors of the company were made defendants, who asked leave to file cross-bills. These claims of the judgment and other creditors were all subsequent in point of time and right to those of the bondholders under the mortgages. On the 1st of March certain persons petitioned to be made co-plaintiffs.

There was no action of the court on the petition last referred to, and the only cross-bill filed was that of the 24th of February, already mentioned. There was a demurrer to the bill, which had been argued and taken under advisement by the court. There had also been some incidental motions made in the case, which need not be particularly referred to. The court had adjourned for the term. This was accordingly the position of the case, when, on the 22d day of March, petitions were filed in the suit with the clerk of the court by the railroad company, a corporation of this state, Judson the president, and Tenney the treasurer, and by the trustees Roberts, Fosdick and Fish, asking for the removal of the cause from the state court to this court, under the Act of Congress of the 3d of March 1875. The petitions alleged that the amount in controversy was of the value of more than $500, that the plaintiff was a citizen of Massachusetts, that the parties who had petitioned to be made co-plaintiffs were citizens of Pennsylvania, and that Judson, Tenney and Fish were citizens of New York, Fosdick a citizen of Connecticut, and Roberts a citizen of Illinois. Bonds were filed, conditioned as required by the Act of Congress. A transcript of the record of the suit in the state court was filed in this court March 24th. This was now a motion to dismiss the suit, on the ground that this court had no jurisdiction of the case.

Crawford and *McDonald*, for plaintiff.

Walker and *Campbell*, for defendants.

DRUMMOND, J.—It seems to have been the intention, in the recent act, to consolidate into one act all the previous general Acts of Congress conferring jurisdiction upon the Circuit Court, and at the same time to give the court jurisdiction in some cases where no

previous Act of Congress had conferred it. The court has now jurisdiction in suits between the citizens of different states, without regard to the fact whether or not one of the parties is a citizen of the state where the suit is brought. The act also authorizes a case to be removed from the state to the Federal court under such circumstances. The Judiciary Act of 1789, as construed by the Supreme Court, required that each of the parties plaintiff should have the right to sue each of the parties defendant, in a suit between citizens of different states, and equally so in the case of removal from the state to the Federal court under the authority conferred by the 12th sect. of that act. The act of 1866 declared that when a suit was brought in a state court by a citizen of that state against a citizen of another state, and a citizen or citizens of the same state as the plaintiff, that if the controversy might finally be determined between the plaintiff and the citizen of the other state without the presence of the co-defendants, it might be removed to the Federal court. The recent Act of Congress declares that in any suit mentioned in the law when there shall be a controversy which is wholly between citizens of different states, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove the suit into the Federal court. This is the first time that Congress has authorized a defendant, a citizen of the state where the suit is brought, to remove the case from the state to the Federal court. As this is a case where there are several defendants, some of whom have not joined in the petition for removal, the question is whether there is a controversy wholly between the plaintiff and those who have petitioned for a removal and which can be fully determined as between them. The controversy in this case, as between these parties, is whether the bonds referred to in the bill are valid debts against the company, and the mortgages can be foreclosed and the claim enforced against the company; and whether the officers of the company have been guilty of any of the breaches of trust alleged against them. The officers named as defendants, and the railroad company, would seem to be parties whose rights, as between them and the plaintiff, can be fully determined as being a controversy wholly between them. The other parties who have joined in the petition for removal are mere trustees. It is a controversy wholly between citizens of different states.

The fact that there are various judgment-creditors, whose rights are subject to the prior liens of the bondholders, cannot affect the power of removal—their rights remaining unchanged. Neither can the fact that a judgment-creditor has filed a cross-bill, for then it would always be in the power of a creditor to prevent the operation of the statute. The difficulty arising from the possession of the *res* or property by the state court is more apparent than real. If the *res* has been seized as an incident of the controversy between the citizens of different states, then the removal of the cause into the Federal court transfers the *res* with it as a necessary part of the proceedings, and the fact that collateral issues as connected with the *res* have sprung up in the state court, cannot destroy the right of removal, provided the parties seeking it bring themselves within the terms of the statute.

The language of the third section is that the petition for the removal must be filed in the state court before or at the term at which the cause can first be tried. It may prove in some cases, particularly those of equity, difficult to determine the term when the cause can *first* be tried. It is not claimed in this case that the petition was not filed in due time, but it is objected that it was filed in vacation, and not during any term of the court, and that there was no action of the court upon the petition or on the bond. I do not think the objection can be sustained on either ground. The law requires the petition to be filed in the suit, and it may be before the term, and, in fact, it is often desirable immediately after a suit is commenced in the state court to remove it into the Federal court before there is any action of the state court in the case. It is true, that under the statute the bond must be good and sufficient security, but it does not declare that it shall be approved by the judge. It requires the state court to accept the petition and bond and proceed no further in the case. Now suppose the state court should refuse to accept the petition or the bond, or should decide that a bond valid under the law and with good and sufficient security, was not so, would that deprive the party of the right of removal? Clearly not. This statute seems to have been passed with a full knowledge of the difficulties growing out of the action or non-action of the state courts under previous laws, and with a determination to make the power of removal independent of the action of the state court. It is not stated in every case under this statute, as in those of 1789 and of 1866, that certain

facts are to appear to the satisfaction of the court. And this is the more apparent from the authority conferred on the Circuit Court, by the seventh section, to issue writs of *certiorari* to the state courts with power to enforce them, and from what is stated in the same section as to the time of removal if the Circuit Court of the United States shall hold its next term within twenty days after the petition and bond are filed in the state court. The fifth section was intended to protect a party in case of the improper removal of a suit from the state to the Federal court, but the language of that section is peculiarly significant as affecting the motion now before the court. The copy of the record has been filed in this court, and the law seems to indicate under what circumstances only, in such an event, the case should be remanded back to the state court. It is when it shall appear to the satisfaction of the Federal court that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties have been improperly or collusively made, or joined, for the purpose of creating a case cognisable under the act. It is true that the act prescribes the manner in which the removal shall be made, and the directions of the law should be complied with. But the fifth section does not authorize the court to remand or dismiss the cause, for the reason that it may appear that there was any irregularity in the means taken to procure the removal. The purpose obviously was, if the record was filed in the Federal court under the law, and the court could see that it had jurisdiction of the case, it should retain it, notwithstanding there might be defects in the manner of removal.

It is also objected that the record from the state court, while certified by the clerk under the seal of the court, has not also the certificate of the judge. This last has never been considered necessary where the record comes from a court of this state.. The attestation of the clerk under the seal of the court is sufficient in any court of this state, and is so in this court. A further objection is that the petition for removal is not verified by affidavit. That is not required by the Act of 1789 or the Act of 1866, nor is it by the Act of 1875, though it was by the Act of 1867: *The Sewing Machine Cases*, 18 Wall. 552. So that on the whole I think it is the duty of the court to allow the case to stand as between the plaintiff and the parties defendant who have petitioned for its removal into this court, and to overrule the motion to dismiss; and it will be so ordered.

After the foregoing opinion was delivered a re-argument was allowed before DRUMMOND and BLODGETT, JJ., and the opinion of the court was delivered by

DRUMMOND, J.—It has been insisted on the re-argument, that this court cannot take jurisdiction of the case, on two grounds:

1st. The case itself is of such a character that it is not removable under the statute. 2d. The case cannot be removed independent of the action of the state court.

The first clause of the second section of the Act of 1875, states when a case can be removed to the Federal court. It must be a suit of a civil nature at law or in equity, pending at the date of the act, or brought thereafter in the state court. The matter in dispute must exceed $500. It must be a suit arising under the Constitution or laws of the United States, * * * * or in which there shall be a controversy between citizens of different states. * * * * This clause refers to a removal by either party; that is by the whole of what constitutes the one side or the other.

The second clause of that section states when a case can be removed by either party, less than the whole. There must be in a suit in the state court a controversy wholly between citizens of different states, and such that it can be fully determined as between them; if so, then any one or more of the plaintiffs or defenadnts actually interested in the controversy may remove "said suit" into the Circuit Court of the United States.

There was here a civil suit in equity pending in the state court at the date of the act, where the matter in dispute exceeded, exclusive of costs, the sum or value of $500.

Was there in this suit a controversy wholly between citizens of different states? The plaintiff was a citizen of Massachusetts, the railroad company a citizen of Illinois. The railroad company had executed to trustees certain mortgages on its property to secure an indebtedness due from the company, of which the plaintiff held a part. He was not a trustee of either of the mortgages. The trustees and some of the officers of the company made defendants and all of them citizens of different states from that of the plaintiff and the company, petitioned for the removal of the cause.

Now, the controversy between these parties was wholly as to the debt and the validity of the mortgages and the enforcement of the same.

The trustees represented the other creditors as well as the plaintiff. It was then in effect a controversy wholly between the trustees as the representatives of the creditors, and the railroad company. There can be no doubt that, so far as it relates to citizenship, it was entirely competent for the plaintiff to bring his suit in this court instead of the state court. And having done the latter, that it was equally competent for the defendants, as the case then stood, to remove it to the Federal court. Was this right lost by the subsequent facts which appear in the case?

After the bill was filed receivers were appointed, and certain judgment and other creditors were made defendants, one of whom filed a cross-bill.

The mere possession of the property clearly could not affect the result, as appears from the fourth section of the recent act. That was connected wholly with the controversy of the original parties, and did not prevent it from being exclusively between them. It does not appear that any of the creditors were citizens of the same state as the plaintiff, but conceding that there was a controversy in the suit whether the judgments were valid liens on the property, and whether the debts of the other creditors were binding on the company, and that some of the creditors were citizens of the same state as the company, was the right of removal gone?

It is said that the language of the second section of the Act of 1875 is different from the Act of 1866, the former declaring that either one or more of the parties "may remove *said suit*" into the Federal court. It is insisted that means the whole suit and not the part which involves merely a controversy between citizens of different states, and therefore, if there should be incidentally a controversy in the suit between citizens of the same state the effect would be to remove this last as well as the other, and therefore, the Federal court would take jurisdiction of a controversy between citizens of the same state, which would be unconstitutional.

If we were to admit the premises we hardly think the conclusion would follow. If the whole suit is removed because of the principal controversy between citizens of different states, and in order to fully determine that as between them, other controversies between citizens of the same state arise in the suit, there is no objection to the Federal court taking jurisdiction of the latter. It is matter of common practice to do this in the settlement of

legal and equitable rights. Having control and jurisdiction of the principal, the incidents go with it. In every case where this court forecloses a railroad mortgage, this doctrine is enforced; so that the true rule even on the hypothesis stated, would seem to be to ascertain whether this court had jurisdiction of what may be regarded as the main controversy, and whether the others between citizens of the same state, are mere incidents of such controversy. In this case the claims of the defendant-creditors, it is presumed, depend on the effect and validity of the mortgages, which, if sustained, give the bondholders the paramount claim. The former may therefore be said to attend the mortgage-debts. If this is so, there is no good reason why the whole suit may not be removed to this court. Whether the act intends to authorize the removal of the whole suit in every case where there is a controversy between citizens of different states, and which can be fully determined as between them, without regard to other controversies in the same suit and the citizenship of the parties in the suit, and whether, if so, the act is in that respect constitutional, need not be here decided. Neither is it necessary to decide whether the act, in any case where there may be in the suit controversies between citizens of the same state, permits them to remain to be determined by the state court.

Upon the second ground we commence with two admissions made by the plaintiff's counsel. They concede:

1st. Under the 3d section of the Act of 1875, the petition for removal and the bond required, can be filed in the suit pending in the state court in vacation.

2d. If the statute is complied with, the state court has no discretion, and its refusal to accept the petition and bond, and the omission to note the refusal on the record, would not deprive the party entitled thereto of the right of removal.

These admissions necessarily grow out of the words of the statute. If the facts as named therein exist, then the party entitled to remove the suit may file a petition in such suit in the state court *before the term* at which the cause could be first tried, and file *therewith* a bond with good and sufficient security. The bond and petition may therefore both be filed out of term time; they are to be filed in the suit pending in the state court, that is, with the clerk in the ordinary way in which papers are marked and filed in a suit. Now, if the proper petition and bond are filed with the

clerk in the suit pending in the state court by the party entitled to do so, in vacation, what is the status of the case from the time of filing the same until the meeting of the state court?

According to the view of plaintiffs' counsel, the court having had no opportunity in open court to accept or refuse the bond and petition, there is jurisdiction still in the state court, and the judge of that court can make any order in the case permitted to a judge under such circumstances; that is, he can, if necessary, grant an injunction, and (in this state) appoint a receiver of property. There ought to be authority somewhere to protect the rights of parties in the contingency named. Having filed the petition and bond with the clerk in the given case, the applicant has done all that the statute requires. He need not call upon the court to act at all. No order is to be made in court, at least the statute names none, unless the mandate that the court "shall accept the petition and bond" implies one.

The language is somewhat different in the other statutes: "shall accept the surety." When is it that the court shall "proceed no further in such suit?" It is well to notice the different language in another part of the section. When the suit relates to the title of land, and is between citizens of the same state, then the value must be made to appear, and certain statements (and affidavit if required by the court) must be made, all showing the court is called on to act. But it is said that, in this case, the court must judge whether the bond has good and sufficient security, and must accept that and the petition. It may be proper to consider the former legislation on this point. The Act of 1789 required, in order to effect a removal from the state to the Federal court, that the defendant should, at the time of entering his appearance in the state court, file the petition for removal.

The Act of 1866 declared that the petition might be filed "at any time before the trial or final hearing of the cause;" but nothing is said as to the manner of filing other than by the use of such general words. The Act of 1867 required an affidavit and petition to be filed in the state court at any time before the final hearing or trial of the suit.

These acts were all repealed by the Revised Statutes of the United States, which, however, incorporated their substantial provisions in section 639.

The law in force upon the subject of removal, at the date of the

Act of 1875, was as follows: "In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer *in said state court* good and sufficient security," &c.

The Act of 1875 for the first time expressly authorized the petition and bond to be filed out of term time. There must have been some object in this change. We think it was to prevent the state court from proceeding further in the case after the proper papers were filed in the suit with the clerk.

There was nothing more to be done in order to perfect the right. A condition of the bond is that the petitioner shall enter in the Circuit Court of the United States at its next term a copy of the record of the suit and pay the costs if the suit be wrongfully removed, and is for the benefit of the opposite party.

The seventh section of the statute has an important bearing on the question. It often happens that the terms of the state court are only once or twice a year. If after the filing of the petition and bond in the suit in the state court not in term, the Circuit Court of the United States should sit before the state court; for example, the former in one month and the latter in two months from the time of filing the petition and bond, if there must be an opportunity for the state court to act on them before the right of removal is perfected, how is it possible for the petitioner to comply with the condition of the bond?

The only answer that can be given is that in spite of the words of the third section, that the bond and petition may be filed before the term, there is in fact and law no filing of the petition and bond until the court is in session, in effect thereby striking those words out of the statute, and thus the state judge has power over the case from the commencement till the petition and bond are presented to him while holding court, which we think Congress intended he should not have when they were duly filed in vacation.

Under previous laws, in some instances the clerks of the state court would not give copies of the record when a petition for removal was filed. The recent act imposes a severe penalty in case of their refusal to furnish a copy of the record after tender of the legal fees, to any one *applying* for removal, not when the removal is ordered or refused by the court. It is said there must be a power in the state court to determine whether the petition and bond are sufficient, and whether the case is removable under the statute. It is true that the party seeking the removal of the

cause must be entitled to the same, but we think the statute did not intend to permit the state court to judge in such a case as this whether a proper case was made. That was one of the difficulties under former statutes. If the state court chose to proceed, the only remedy was supposed to be through the highest court of the state, to the Supreme Court of the United States. See *Hough* v. *W. T. Company*, 1 Bissell 425; *Akerly* v. *Vilas*, 2 Bissell 110; *In re Cromie*, 2 Bissell 160, and authorities cited in those cases and notes. This statute gives the Circuit Court of the United States power to issue the writ of *certiorari* to the state court in any cause removable under the act, and therefore to the Federal court the right to determine whether the cause is properly removable.

It is claimed by the plaintiffs' counsel that is given when the state court refuses to act. But the state court may omit to place on the record the refusal or non-action, and whether it does or not there can be no object in issuing a writ of *certiorari*, the sole effect of which is to bring the record into the Federal court, if it is already there duly certified by the clerk under the seal of the state court. This statute has not given power to the Circuit Court of the United States to compel the state court to act by writ of *mandamus* or otherwise. The sole object of the writ of *certiorari*, as the statute itself says, is to make return of the record.

The fifth section contains provisions which are new. It is true that in practice under previous laws, when a case came into the Federal court by removal from the state court, motions could be made to dismiss and remand the case, but their decision depended on general principles. Now the fifth section controls the action of the Federal court both as to the dismissal and remanding of cases. It did not intend the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appeared that the court had jurisdiction of the cause. Here the only thing to which objection is now made is as to the character of the suit and *the want of opportunity of the state court*, as a court, to act or refuse to act. There is no complaint made against the sufficiency of the bond.

It is said we treat the state courts with disrespect in not allowing them to pass upon the case under the statute. We would treat them more disrespectfully if we disregarded and overruled